

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mike Knell, dba JTR Publishing,

Complainant,

vs.

Pacific Bell Telephone Company and AT&T
Communications of California, Inc.,

Defendants.

Case 01-07-034
(Filed July 25, 2001)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING IN PART AND DENYING IN PART
PACIFIC BELL TELEPHONE COMPANY'S MOTION
TO DISMISS ITSELF AS A DEFENDANT**

This ruling grants in part and denies in part Pacific Bell Telephone Company's (Pacific) motion to dismiss it as a defendant. Triable issues of fact remain concerning service quality, Rule 11 restrictions and overcharging. Issues concerning Complainant's directory listings are dismissed with respect to Pacific, because Pacific's resale services tariff places liability for directory listing mistakes on the retail service provider.

Background

On October 18, 2001, Pacific filed a motion to dismiss the complaint, alleging that the complaint was vague, failed to state a cause of action against Pacific, and was barred by the statute of limitations. Complainant filed a motion

to file amendment to complaint on January 29, 2002. By a February 26, 2002 administrative law judge ruling, leave to file the amendment to complaint was granted. In that ruling, Pacific's October 2001 motion to dismiss was denied without prejudice, because granting the amendment rendered that motion moot.

Pacific filed this motion to dismiss it as a defendant on March 22, 2002. Pacific states Complainant is not Pacific's customer for four of the five lines at issue in this proceeding and Pacific owes no legal duty to Complainant for service quality issues. Pacific's tariff states that it is not liable for competitive local exchange carrier's (CLEC) end-user's mistakes that appear in Pacific's listings. Pacific further states that Complainant's request for relief for the alleged Rule 11 violation is outside the authority of the Commission to grant. Pacific maintains it has provided all refunds owed for the dispute over installation charges for the one line for which Pacific is the retail service provider, so that issue is moot. Finally, Pacific states that any direct cause of action Complainant asserts against Pacific is barred by the statute of limitations.

Complainant filed a reply to Pacific's motion to dismiss. Complainant states that his allegations are not barred by the statute of limitations, because the statute of limitations was tolled by the recent discovery of events and service records. Complainant states that the listing issues should not be dismissed as to Pacific, even if Pacific is not liable to the end-user, because Pacific lied to the Commission about information available to Pacific concerning Complainant's listings. Complainant further states that he is not seeking damages for Pacific's wrongful application of Rule 11 but is seeking penalties the Commission can award. Finally, Complainant states he has not received all refunds due on the incorrect installation charges.

Discussion

Standard of Review for Motions to Dismiss

A motion to dismiss¹ essentially requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. (*Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC2d 244, 249.)

Issues Concerning Complainant's Directory Listings Are Dismissed With Respect to Pacific

Complainant has no cause of action against Pacific for any issue concerning changes in his directory listings. Thus, those issues are dismissed with respect to Pacific. Pacific's Tariff No. 175-T, Services for Resale, Section 18.1.3 provides that:

The Utility is not liable for mistakes that appear in the Utility end-user listings, 911 or 411 databases, or for incorrect referrals of end-users to CLC Reseller for any ongoing customer service, sales, installation or repair inquiries, and with respect to such mistakes or incorrect referrals, the CLC Reseller shall save harmless and indemnify the Utility from any and all claims, demands, causes of action and liabilities whatsoever, including costs, expenses and reasonable attorney's fees incurred on account thereof, by third persons (including the CLD Reseller's employees).

Complainant alleges his problems with directory listings began when AT&T Communications of California, Inc. (AT&T) became his retail service provider. Pacific's resale services tariff, under which AT&T provides service to

¹ Pacific filed its motion to dismiss pursuant to Rules 45 and 56 of the Commission's Rules of Practice and Procedure.

Complainant, places liability for directory listing mistakes on the retail provider. Whether Pacific is responsible for the alleged directory listings problems is irrelevant. As a matter of law, the allegations against Pacific concerning Complainant's directory listings must be dismissed.

Remaining Allegations Against Pacific Present Triable Issues of Fact

Pacific's motion to dismiss the remaining issues directed against it, service quality, application of Rule 11, and overbilling, is denied, because there remain triable issues of fact concerning those issues. Although Pacific's tariff provides that Complainant is AT&T's customer, Complainant alleges that recent information received on the reasons for service problems should toll the statute of limitations and make Pacific liable for service quality problems that arose while Complainant was Pacific's customer. Whether that information is sufficient to toll the statute of limitations and consider the underlying issue presents a triable issue of fact.

There remains a triable issue of fact as to whether Complainant has received all refunds to which he is entitled from Pacific. Pacific states all refunds have been provided, and Complainant states he is owed \$6.00. At this time Pacific's motion to dismiss that issue must be denied.

Pacific continues to impose the Rule 11 written contact restriction on Complainant and states that it followed the requirements of the tariff in imposing Rule 11 in 1997. Complainant alleges that he has recently discovered information that shows Pacific improperly invoked Rule 11, which should toll the statute of limitations. Whether that information is sufficient to toll the statute of limitations and consider the underlying issue presents a triable issue of fact.

IT IS RULED that:

1. Pacific Bell Telephone Company's motion to dismiss itself as a defendant is granted in part and denied in part.
2. Issues 3 and 4 in the February 26, 2002 ruling amending scoping memo are dismissed with respect to Pacific Bell Telephone Company.

Dated May 17, 2002, at San Francisco, California.

/s/ JANICE GRAU
Janice Grau
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Granting in Part and Denying in Part Pacific Bell Telephone Company's Motion to Dismiss itself as a Defendant on all parties of record in this proceeding or their attorneys of record.

Dated May 17, 2002, at San Francisco, California.

/s/ ERLINDA PULMANO
Erlinda Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY **1-866-836-7825 or (415) 703-5282 at least** three working days in advance of the event.